ORIGINAL

DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Inter-Carrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68

COMMENTS OF THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

Robert L. Hoggarth, Esquire
Senior Vice President, Paging and Messaging
Angela E. Giancarlo, Esquire
Director, Federal Regulatory Affairs
Personal Communications Industry Association
500 Montgomery Street; Suite 700
Alexandria, VA 22314-1561
(703) 739-0300

April 12, 1999

SUMMARY

PCIA hereby submits its comments on two limited aspects of the Commission's Notice of Proposed Rulemaking. First, PCIA urges the Commission to narrowly tailor any decision it may reach to defer to state commissions in the context of interconnection agreements pertaining to Internet-bound traffic so as not to undermine its unique and well-established authority to establish national rules governing interconnection and relating to local competition. The Commission has jurisdiction to adopt rules to implement Section 251 of the Telecommunications Act of 1996. The Supreme Court has resoundingly affirmed the Commission's jurisdiction in this regard. In addition, the FCC's unique jurisdiction over Commercial Mobile Radio Service providers and the interconnection of their networks to those of local exchange carriers is well-established. While the Commission may have particular reasons for deferring to state commissions issues pertaining to Internet traffic in light of the distinct regulatory treatment the Commission has applied to such traffic, the FCC should make sure that any such decision is limited in scope to Internet traffic.

Second, PCIA respectfully submits that the instant proceeding is not the appropriate forum for resolution of issues regarding the nature and extent of telecommunications carriers' rights under Section 252(i) of the Telecommunications Act of 1996. This proceeding is otherwise limited in scope to issues arising out of Internet traffic. In contrast, the nature and extent of Section 252(i) rights impact *all* telecommunications carriers. Therefore, the Commission should address these issues in a proceeding in which all interested parties have a meaningful opportunity to comment. Should the Commission decide, however, to reach these issues in this proceeding, PCIA respectfully submits that the Commission should act to foster Section 252(i) rights since they are a critical component of interconnection negotiations. Section

252(i) serves to level the playing field between parties to a negotiation -- attempting to correct the imbalance of bargaining power which local exchange carriers historically have used to their advantage. To that end, PCIA believes that the Commission should confirm, *inter alia*, that carriers are entitled to flexible windows in which to opt into previously approved agreements and that the term of the subsequent agreement should be equal to that of the original agreement. PCIA believes that Commission action in support of effective Section 252(i) rights will foster the proliferation of fair interconnection agreements and competition in the marketplace.

TABLE OF CONTENTS

I. THE INTEREST OF PCIA 2

II. ANY DEFERRAL TO THE STATES IN THIS PROCEEDING SHOULD BE BASED UPON THE UNIQUE ASPECTS OF INTERNET-BOUND TRAFFIC 3

III. THE FCC SHOULD PROTECT AND PRESERVE REQUESTING CARRIERS' SECTION 252(i) MOST -FAVORED NATION (MFN) RIGHTS 7

IV. CONCLUSION 12

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Inter-Carrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68

To: The Commission

COMMENTS OF THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

The Personal Communications Industry Association ("PCIA") hereby comments on the *Notice of Proposed Rulemaking* ("*NPRM*") released in the above-captioned proceeding.[1/] As is set forth in detail within, PCIA respectfully submits that any decision to defer to state commissions regarding the terms and conditions of agreements between telecommunications carriers pertaining to compensation for Internet bound traffic should be narrowly crafted to avoid undermining the authority of the Federal Communications Commission (the "Commission" or "FCC") to establish national standards in other areas affecting local competition. PCIA further urges the Commission to avoid in this proceeding any ruling with respect to the scope of carriers' rights under Section 252(i) of the Communications Act of 1934, as amended (the "Act"), that would inhibit the ability of a requesting carrier to pick and choose the terms of a previously

---

1/ FCC 99-38, released February 26, 1999.

approved agreement between a local exchange carrier (a "LEC") and another telecommunications carrier. The following is respectfully shown:

I. THE INTEREST OF PCIA

PCIA is an international trade association[2/] which includes as members a broad cross-section of wireless telecommunications carriers who are intended beneficiaries of the pro-competitive policies embodied in the Telecommunications Act of 1996 (the "1996 Act").[3/] Consequently, PCIA and its members have a direct interest in the outcome of proceedings such as this one in which the Commission is seeking comment on the nature and extent of statutory rights granted by the 1996 Act.[4/]

Many of PCIA's members also fall within the class of carriers categorized as Commercial Mobile Radio Service ("CMRS") providers. The FCC has special jurisdictional authority with respect to CMRS carriers by virtue of Section 332 of the Act.[5/] Because of this, PCIA and its CMRS members have a direct interest in any FCC proceeding in which determinations are being made as to whether specific issues arising under the 1996 Act should be

---

2/ PCIA is an international trade association created to represent the interests of the commercial and private mobile radio service communications industries. PCIA's Federation of Councils includes: the Paging and Messaging Alliance, the Broadband PCS Alliance, the Wireless Broadband Alliance, the Mobile Wireless Communications Alliance, the Site Owners and Managers Association, and the Private System Users Alliance. In addition, as the FCC-appointed frequency coordinator for the 150-512 MHz frequency bands in the Business Radio Service, the 800 and 900 MHz Business Pools, the 800 MHz General Category frequencies for Business Eligibles and conventional SMR systems, and the 929 MHz paging frequencies, PCIA represents and serves the interests of tens of thousands of licensees.

3/ Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C Section 151 *et. seq.*

4/ *See, e.g., NPRM* para. 35 which seeks comment on the effect on interconnection negotiations of a requesting carrier's rights under Section 252 (i) of the Act.

5/ 47 U.S.C. Section 332.

resolved in a federal or a state forum. In particular, PCIA has an interest in assuring that jurisdictional decisions affecting non-CMRS services are not interpreted or construed to limit the authority of the FCC to exercise its federal jurisdictional authority under Section 332 of Act.

II. ANY DEFERRAL TO THE STATES IN THIS PROCEEDING SHOULD BE BASED UPON THE UNIQUE ASPECTS OF INTERNET-BOUND TRAFFIC

The FCC, to its credit, has succeeded in securing a series of favorable court rulings which preserve and protect its ability to establish national standards governing the local competition provisions of the 1996 Act. The 8th Circuit affirmed the FCC's broad authority under Section 332 of the Act to adopt rules governing interconnection arrangements between LECs and CMRS carriers.[6/] The FCC's sweeping general authority over all matters pertaining to the 1996 Act was resoundingly established by the Supreme Court:

> the question in this case is not whether the Federal Government has taken regulation of local telecommunications competition away from the states. With regard to the matters addressed by the 1996 Act, it unquestionably has.

AT&T Corp. v. Iowa Utilities Board, 119 S.Ct. 721, n. 6 (1999).

The importance of these rulings cannot be understated. As the Commission recognized in its *Local Competition First Report,*[7/] in some instances "national rules are highly desirable to achieve Congress's goal of a pro-competitive national policy framework for the

---

6/ See *Iowa Utilities Board v. FCC*, 120 F.3d 753, n.21 (8th Cir. 1997), *modified on rehearing*, Slip Op. (8th Cir., Oct. 14, 1997) *aff'd in part and rev'd in part AT&T v. Iowa Utilities Board* 119 S.Ct. 721 (1999).

7/ *Implementation of the Local Competition Provisions in the Telecommunications Act, First Report and Order*, 11 FCC Rcd. 15499 (1996)

telecommunications industry."[8/] The FCC also properly has determined that establishing a national baseline of minimum requirements can serve to mitigate the LECs' use of their unequal bargaining power to frustrate carriers who are seeking to compete on a national or regional basis.[9/]

The *NPRM* raises the issue of whether the inter-carrier compensation for ISP- bound traffic -- which the FCC has decided is, in substantial part, interstate -- should be governed prospectively by interconnection agreements negotiated and arbitrated before state commissions under Sections 251 and 252 of the Act, or rather governed by a set of federal rules implemented in a federal arbitration forum. *Compare NPRM* para. 30 to 31. Obviously, the carriers most directly affected by the outcome of this decision will be the LECs and competitive LECs ("CLECs") who will be parties to the agreements pursuant to which the ISP-bound traffic is transported. Consequently, PCIA is taking no position at this time on whether intercarrier compensation issues with respect to ISP-bound traffic should be resolved at the federal or state level. Nevertheless, PCIA urges the Commission, regardless of how this particular jurisdictional decision comes out, to make clear that it is based upon the unique aspects of the Internet/ISP issues that are presented. The decision should expressly state that it is not intended and should not be construed to prevent the Commission from reaching a contrary decision in another context.

The issue of whether states provide the appropriate forum to resolve compensation issues pertaining to Internet-bound traffic is *sui generis*. ISPs traditionally have been afforded a

---

8/ *Id.* at para. 62.

9/ *Id.* at paras. 55-60.

regulatory classification and treatment which permits consideration and resolution of this compensation issue separate and apart from other reciprocal compensation issues. For example, notwithstanding the recent decision which concludes that Internet-bound traffic should be viewed as a single end-to-end communication between a calling party and the Internet, ISPs traditionally have been treated as end-users. This treatment has had a series of ramifications. For example, ISPs were exempted from paying access charges; ISPs generally ordered services from underlying LECs via intrastate tariffs as local business end-users; CLECs serving ISPs have been viewed as the terminating carrier for ISP-bound traffic and, as a consequence, much of the Internet-bound traffic has been viewed as intrastate. Most important, over 20 state regulatory commissions specifically have addressed the issue of reciprocal compensation for Internet traffic, and in the process have invested significant resources and developed substantial familiarity with Internet traffic issues.

Given this unique regulatory history, the FCC could decide to defer to the states on the issue of intercarrier compensation involving ISP-bound traffic without the decision having any precedential value in other distinguishable contexts.[10/] For example, CMRS reciprocal compensation issues arise in a very different context. The FCC consistently has found that CMRS providers are telecommunications carriers, not mere end users.[11/] Unlike ISPs, CMRS

10/ Indeed, PCIA respectfully submits that the FCC exercising its jurisdiction over the portion of CLEC traffic going to ISPs, while leaving state commissions to handle non-ISP traffic, would result in a cumbersome bifurcation of responsibility.

11/ *See Amendment of Part 21 of the Commission's Rules*, 12 FCC 2d 841 (1968); *recon. denied*, 14 FCC 2d 269 (1968), *aff'd, Radio Relay v. FCC*, 409 F. 2d 322 (2d. Cir. 1969); *Interconnection Between Wireline Telephone Companies and Radio Common Carriers*, 63 FCC 2d 87 (1977); *Interconnection Between Wireline Telephone Companies and Radio Common Carriers*, 80 FCC 2d 351 (1980); *MTS/WATS Market Structure,*

(continued...)

carriers generally do not order necessary telephone facilities out of end-user tariffs. The CMRS carrier itself is the terminating carrier. The FCC has not adopted for CMRS carriers, as it did for ISPs, an exemption from access charges; instead, certain CMRS calls remain subject to access charges.[12/] In addition, the FCC has consistently found that CMRS services are jurisdictionally mixed.[13/]

Most importantly, by virtue of Section 332 of the Act, the FCC has been accorded "special" jurisdiction over CMRS carriers and state commissions have been preempted from exercising rate and entry regulation over CMRS carriers. Congress intended this special jurisdiction because of the fact that wireless services operate without regard to state and local service boundaries. The FCC and federal courts have rejected several petitions filed by state regulatory bodies seeking to continue past regulation of CMRS services, thereby solidifying its own primary role in the regulation of CMRS carriers.[14/] Indeed, the FCC actually established a

---

11/ (...continued)
Second Reconsideration Order, 97 FCC 2d 834 (1984); *Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Service*, 59 RR2d 1275, Appendix B (1986); *Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Service,* 2 FCC Rcd. 2910 (1987), *and Order on Reconsideration*, 4 FCC Rcd. 2368 (1989); *Local Competition First Report* at para. 993.

12/ *Local Competition First Report*, paras. 1036, 1043.

13/ *Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services, Second Report and Order*, 9 FCC Rcd. 1411, para. 227 *et seq.* (1994).

14/ *See, e.g., Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority over Intrastate Cellular Service Rates, Report and Order* 10 FCC Rcd. 7486 (1995), *Order on Reconsideration* FCC 95345 (Aug. 9, 1995); *Petition of Arizona Corporation Commission to Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services*, 10 FCC Rcd. 7824 (1995); *Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services*, 10 FCC

(continued...)

rule pursuant to Section 332 requiring LECs to pay mutual compensation to CMRS carriers *before* the 1996 Act became law. *See* 47 C.F.R. Section 20.11 (1994).

In light of the foregoing, the FCC should take care to assure that its determination of the appropriate regulatory body to set rules governing, or arbitrate disputes relating to, ISP-bound traffic should be specifically limited to that type of traffic. The FCC must recognize the unique aspects of Internet-bound traffic in drafting its decision and specifically reserve the right of the Commission to establish a federal forum in other instances.

III. THE FCC SHOULD PROTECT AND PRESERVE REQUESTING CARRIERS' SECTION 252(i) MOST -FAVORED NATION (MFN) RIGHTS

In one paragraph toward the back of the *NPRM*, the FCC seeks comment on "whether and how Section 252(i) and MFN rights affect a parties' ability to negotiate or renegotiate interconnection agreements."[15/] The inquiry arose out of an isolated concern expressed by one LEC that an interim ruling in a state arbitration proceeding might allow a requesting carrier to extend the term of an approved interconnection agreement beyond its original term.

Section 252(i) is an important statutory provision, all the more so because of the Supreme Court decision reinstating the FCC's "pick and choose" rule.[16/] In light of Section 252(i)'s significance, PCIA respectfully submits that the instant proceeding is not the appropriate forum in which to explore the ramifications of this statutory provision. Section 252(i) rights run to the benefit of *all* telecommunications carriers, not just those interested in the resolution of issues relating to Internet-bound traffic. Therefore, any determination concerning the nature and extent

---

14/ (...continued)
Rcd. 7842 (1995).

15/ NPRM, para. 35.

16/ 47 C.F.R. §51.809.

of a carriers' rights under Section 252(i) will have a direct and substantial impact upon all telecommunications carriers entitled to exercise these rights. Since this proceeding is limited in scope to that of Internet-related compensation, not all parties who have an interest in decisions determining the extent of Section 252(i) rights will be parties to this proceeding, and may therefore be deprived of a fair opportunity to have their views heard on this subject.

Moreover, it is premature to seek comment on the effect of Section 252(i) on interconnection negotiations and renegotiations. The Supreme Court decision in the AT&T Corp. v. Iowa Utilities Board case reinstates Section 51.809 of the FCC rules, which had been stayed and vacated by the 8th Circuit. Since the Supreme Court decision is so recent, neither requesting carriers nor LECs have had a sufficient period of time to assess in any meaningful fashion the impact of this "pick and choose" rule on the conduct of their negotiations. Consequently, the Commission should defer any far reaching consideration of the impact of Section 252(i) at this time.

Should the Commission decide to consider and address the issue of Section 252(i) rights in the instant proceeding, however, PCIA respectfully submits that any rules or policies which are adopted should provide telecommunications carriers with the maximum possible flexibility in the exercise of their Section 252(i) rights. As the Commission correctly observed in its *Local Competition First Report,* Section 252(i) is a "primary tool" in the 1996 Act to prevent discrimination.[17/] The Commission should be particularly wary of any action that would interfere with or inhibit the efforts of carriers seeking to invoke Section 252(i) to secure interconnection agreements with ILECs. Both historically and currently, many non-ILEC telecommunications

---

17/ *Local Competition First Report*, paras. 1296-1323.

carriers have failed to enjoy any real bargaining power in interconnection negotiations and have had only limited resources *vis-a-vis* ILECs. Protecting, preserving and extending the right of requesting carriers to adopt, in whole or in part, previously negotiated interconnection agreements is an important means to assure that the benefits of the 1996 Act are enjoyed by a broad cross section of competing carriers.[18/]

PCIA believes that the Commission should not adopt rigid time periods for carriers to opt-into previously negotiated agreements or rigid rules governing the terminal date of agreements adopted from other carriers. Many practical business factors may affect the timing of a telecommunications carrier's decision to seek to opt into a previously approved agreement. These may include: (i) the expiration date of an existing agreement; (ii) the status of negotiations between the carrier and the ILEC; (iii) presence within (and resultant need for an interconnection agreement within) the state governed by the agreement; and (iv) uncertainty regarding the effect of ongoing legal challenges on an approved agreement. In addition, there are many instances of ILEC delay in providing, or agreeing to offer, a particular interconnection, service or network element pursuant to Section 252(i) which has precluded carriers from promptly securing

---

18/ Indeed, even with the rights conferred by Section 252(i), some carriers continue to have difficulty opting into previously negotiated and approved agreements in toto. These difficulties have been the subject of litigation. *E.g.*, AirTouch Paging and AirTouch Paging of Kentucky v. BellSouth Telecommunications, Inc., U.S.D.C. Ga., Civil Action File No. 1:98-CV-3085-JOF; AirTouch Paging of California v. Pacific Bell, U.S.D.C. Ca., No. C 98-02216 MHP. Needless limitations and/or prolonged rulemakings on the nature and extent of Section 252(i) rights will only increase the hurdles these carriers face.

previously approved agreements.[19/] In light of these various factors, many of which are beyond the control of the telecommunications carrier seeking the interconnection agreement, the Commission should adopt flexible rules and policies regarding opt-in periods. Doing so would acknowledge and reflect in the rules an understanding of the workings of the marketplace.

The Commission also should adopt flexible rules and policies with respect to the applicable term of an interconnection agreement into which a requesting carrier opts. The practical business factors listed above, which can affect a carrier's decision to opt into an existing agreement, warrant a flexible period of agreement. By not considering these factors, the Commission could seriously damage the rights provided by Section 252(i). For example, by reducing the term of agreement to the time left under the original agreement, which could be such a brief period, *e.g.*, six months or a year, the Commission could render the resultant agreement almost meaningless.

PCIA respectfully suggests that this is not the proper proceeding in which to decide this issue. However, if the Commission decides to offer guidelines, the Commission must, at a minimum, provide much-needed clarification on two issues. First, the Commission must ensure that a requesting carrier seeking to adopt an approved agreement *in toto* should be able to do so *at any time* during the initial term of the approved agreement. Second, the requesting carrier should be entitled to receive *promptly* from the LEC an agreement which tracks the language in the previously approved agreement word for word (except for the minimal changes necessary to

---

19/ Some of PCIA's members have experienced difficulties in this regard, including, *e.g.*, purposeful delay in providing working copies of requested agreements, attempts to modify certain terms in previously approved agreements, and purposeful delay in executing agreements pursuant to Section 252(i).

identify the new party to the agreement). These two bright line rules will add welcome certainty to the Section 252(i) process while at the same time avoid situations in which Section 252(i) requests are forestalled by a LEC's unilateral efforts to impose "clarifying changes."

PCIA believes that this reasoned, flexible approach is fair to all parties. While the *NPRM* appears to reflect a concern regarding the period for which ILECs would be subject to the terms of existing agreements, PCIA respectfully submits that this is not unfair to the ILECs. The agreements to which Section 252(i) applies are voluntarily negotiated or state approved agreements. Thus, the terms and conditions to which these ILECs will be bound are those to which they previously agreed during voluntary negotiations in which those ILECs enjoyed the majority of the bargaining power or pursuant to arbitrations conducted consistent with the Act. To require the ILECs to be bound by those same terms and conditions in subsequent agreements with other carriers consistent with the *Local Competition First Report* and Section 51.809 of the FCC's Rules is not unjust -- it is exactly what Congress intended when drafting Section 252(i).

For example, Section 51.809(c) requires only that a LEC make an approved interconnection agreement available for "a reasonable period of time" after the agreement is approved. Of course, what is "reasonable" will be a highly fact specific determination, and should not be decided by the FCC in the abstract. For example, it might be reasonable for a LEC to be obligated to make a particular TELRIC-based rate available for a period of several years if the elements of the cost study that lead to the rate have remained largely unchanged over time. In contrast, it may be reasonable to make another offering available for a shorter period of time if there are significant technology changes or pricing changes that serve to undermine the basis of the original offering. Lastly, the period of time that a particular interconnection, service, or

network element should be available to another requesting carrier may also be affected by whether the requesting carrier is seeking to adopt the prior agreement in whole or in part.

PCIA believes that Commission action supporting meaningful Section 252(i) and MFN rights will have a positive affect on the ability of parties to negotiate and renegotiate interconnection agreements. Predictably, the knee jerk reaction of some LECs to the reinstatement of Section 51.809 was to express reluctance to agree to some requested terms based upon their uncertainty regarding the ability of other carriers to "cherry pick" those terms. PCIA is hopeful that these issues will, however, sort themselves out over time. Ultimately, LECs will not be able to refuse to meet reasonable requests for interconnection. Thereafter, PCIA is hopeful that others will be able to benefit from similar arrangements consistent with the limitations contained in Section 51.809 and the *Local Competition First Report*. Provided that there is adequate FCC enforcement and monitoring of Section 252(i) rights, PCIA anticipates that the net effect will be a proliferation of non-discriminatory interconnection agreements which will serve to enhance competition within the market.

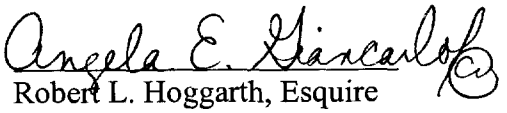
IV. CONCLUSION

The foregoing premises having been duly considered, PCIA respectfully submits that the Commission's ultimate decision regarding proper jurisdiction for adjudication of intercarrier agreements pertaining to ISP-bound traffic must be based upon the unique aspects of the Internet/ISP issues. PCIA further submits that the FCC should resolve issues relating to the scope of carriers' rights under Section 252(i) of the Act in a broader proceeding in which all interested parties have an opportunity to comment. However, any decision that the Commission

renders with respect to Section 252(i) rights should reflect the critical role those rights play in interconnection negotiation and promote flexibility in carriers' exercise of those rights.

Respectfully submitted,

THE PERSONAL COMMUNICATIONS
INDUSTRY ASSOCIATION



Robert L. Hoggarth, Esquire
Senior Vice President, Paging and Messaging
Angela E. Giancarlo, Esquire
Director, Federal Regulatory Affairs
Personal Communications Industry Association
500 Montgomery Street; Suite 700
Alexandria, VA 22314-1561
(703) 739-0300

April 12, 1999